Supreme Court, U.S.
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No. 95-769

In The

Supreme Court of the United States

October Term, 1995

EUGENE ALLEN,

Petitioner,

vs.

TAMMY ALLEN, Individually and BREANNE ALLEN and HEATH ALLEN, Minors, by their Guardian MERLE KRAMER,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the actions of the state courts of Pennsylvania, in refusing to acknowledge, consider and answer the argument central to Petitioner's defense, constitute a denial of due process as guaranteed by the Fourteenth Amendment?

LIST OF PARTIES INVOLVED IN UNDERLYING CASE BUT NOT INVOLVED IN INSTANT PETITION

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OPINIONS BELOW

To the best of Petitioner's knowledge, none of the opinions issued in this case have ever been reported in any official reporters. The following opinions, all of which are included in the Appendix filed concurrently herewith, were filed in this case.

1. Judgment and Memorandum Opinion of the Superior Court of Pennsylvania, dated November 28, 1994.

2. Opinion of the Honorable David S. Cercone of the Court of Common Pleas of Allegheny County, dated February 28, 1994.

3. Opinion of the Honorable Bernard J. McGowan of the Court of Common Pleas of Allegheny County.

STATEMENT OF JURISDICTION

On July 21, 1995, the Supreme Court of Pennsylvania issued a Per Curiam Order at No. 126 W.D. Allocatur Docket in which it denied the Petition for Allowance of Appeal filed on behalf of Eugene Allen, Petitioner herein, which sought discretionary review from the Supreme Court of Pennsylvania of the Judgment and Memorandum Opinion of the Superior Court of Pennsylvania at No. 1578 Pittsburgh 1994. The Superior Court of Pennsylvania affirmed the Judgment entered at G.D. 89-13380 in the Court of Common Pleas of Allegheny County, Civil Division, on September 10, 1993. Following the July 21, 1995 denial of the Petition for Allowance of Appeal, Petitioner filed a timely Petition for Reconsideration with the Supreme Court of Pennsylvania, which that Court denied August 22, 1995, thereby leaving Petitioner with no recourse except to file this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

> No State . . . shall deprive any person of life, liberty, or property without due process of law. . . .

U.S.Const. amend. XIV, § 2.

> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

Rule 1.11 of the Pennsylvania Rules of Professional Conduct (hereinafter referred to as "Rule 1.11").

STATEMENT OF THE CASE

The underlying civil suit was filed by Tammy Allen, individually and Breanne Allen and Heath Allen, by their guardian, Merle Kramer, Respondents herein, against their grandfather, Eugene Allen, Petitioner herein, and his wife, Elizabeth Allen, seeking compensatory and punitive damages for sexual abuse which Eugene Allen had committed against each of his grandchildren. Prior to the commencement of this civil action, Eugene Allen had been convicted of various crimes based upon the same sexual abuse and was sentenced to a prison term of fifty-five and one-half to one-hundred and eleven years. The prosecutor in the criminal trial was John Zottola, Esquire.

Sometime shortly after the criminal proceedings were completed, Zottola accepted employment with the law firm of Robb, Leonard & Mulvihill (RLM). Thereafter, Respondents retained RLM to represent them in this civil suit. After being retained to represent Petitioner in this civil action, present counsel began questioning the propriety of RLM's representation of Respondents given Zottola's involvement in the criminal prosecution of Petitioner. The Honorable Bernard J. McGowan, as the Calender Control judge, refused to heed Petitioner's pleas for disqualification, maintaining that disqualification was not necessary unless Petitioner could show some prejudice. Petitioner renewed his claim concerning disqualification before the Honorable David S. Cercone at trial. Judge Cercone, however, refused to question the wisdom of Judge McGowan's rulings.

Following a trial, a jury awarded the grandchildren compensatory damages ranging in amounts from $800,000 to $2.5 million. The jury also awarded each of the grandchildren punitive damages of $10 million against Petitioner and $230,000 against Elizabeth Allen. Judge Cercone denied all of Petitioner's

post-verdict motions except the question of disqualification, leaving that question for Judge McGowan, who again ruled that disqualification was not required on the facts of the present case because Petitioner was unable to show any prejudice. Judge McGowan made this ruling despite Petitioner's arguments that case law of the Commonwealth of Pennsylvania established that prejudice was not necessary. Judge McGowan, however, never acknowledged Petitioner's arguments in this regard, let alone responded to those arguments.

Petitioner and Elizabeth Allen filed separate appeals to the Superior Court and the appeals were heard by the same panel. At oral argument, counsel for Petitioner made clear to the court that his argument on the disqualification of counsel was based upon the premise that no prejudice was required under the Rule 1.11 because of case law in Pennsylvania; in any event, counsel informed that court that Petitioner could not identify any prejudice. On November 28, 1994 the Superior Court affirmed the judgment of the Court of Common Pleas of Allegheny County on Petitioner's appeal.[1] In its Memorandum Opinion, the Superior Court stated first that Petitioner had failed to assert any prejudice and that he "failed to provide this Court with any authority . . . interpreting Rule 1.11 to mean that a showing of prejudice or harm is unnecessary." Realizing for the first time that it was possible that the courts of Pennsylvania were simply ignoring his arguments, Petitioner, in an application for reargument to the Superior Court en banc, first alleged that this failure to respond to the argument constituted a denial of due process. The Superior Court nonetheless denied Petitioner's timely application for reargument on January 31, 1995.

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1. Two days after affirming on Petitioner's appeal, the Superior Court, on November 30, 1994, issued an order granting Elizabeth Allen argument before the Superior Court en banc. Oral argument on Elizabeth Allen's appeal was heard on February 22, 1995, but no opinion has yet been issued by that court.

Petitioner then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, in which he recounted t' e failure of the all of the courts below to even acknowledge his arguments, yet alone respond to them. After the Supreme Court denied the Petition for Allowance of Appeal on July 21, 1995, Petitioner filed a Petition for Reconsideration in which he again specifically argued that the refusal of the Pennsylvania courts to acknowledge and respond to his argument constituted a denial of due process; the Supreme Court, however, denied this Petition for Reconsideration on August 22, 1995.

REASONS FOR GRANTING THE WRIT

I.

THE ACTIONS OF THE STATE COURTS OF PENNSYLVANIA, IN REFUSING TO ACKNOWLEDGE, CONSIDER AND ANSWER THE ARGUMENT CENTRAL TO PETITIONER'S DEFENSE, CONSTITUTED A DENIAL OF DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

It has long been well settled that, concerning the principles of the Due Process Clause, "there can be no doubt that at a minimum they require the deprivation of life, liberty or property by adjudication be precedent by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This Honorable Court has made clear that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). Additionally, "the Due Process Clause grants the aggrieved party the opportunity to present his case *and have its merits fully judged.*" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (emphasis added). As one district court has explained:

> Effective access to the courts is a constitutional right, *Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), which "encompasses all the means a defendant or petitioner might require to get a *fair hearing* from the judiciary on all charges brought against him or grievances alleged by him," *Gilmore v. Lynch,* 319 F.Supp. 105, 110 (N.D.Cal.1970), *aff'd sub nom. Younger v. Gilmore,* 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971).

Hilliard v. Scully, 537 F. Supp. 1084, 1086 n. 5 (S.D.N.Y. 1982) (emphasis added). All of the aforementioned principles establish that Petitioner's due process rights, guaranteed by the Fourteenth Amendment, were violated in the present case.

Prior to the commencement of this civil action for damages, Petitioner was convicted of sexually abusing his grandchildren, the same conduct which formed the basis of his grandchildren's action for damages. Petitioner's defense in the civil action was limited because the criminal convictions established that he committed these acts. Petitioner has not, nor could he, attempt to offer any justification for his actions. Rather, he attempted to defend the case on the basis, *inter alia,* that the attorneys for his grandchildren could not, under established Pennsylvania law, represent the grandchildren because of Attorney Zottola's involvement in the criminal prosecution of Petitioner and because of the attorneys' failure to follow procedures available under Pennsylvania law to permit the representation. Yet, despite the limitations placed upon Petitioner in this regard, the courts of Pennsylvania would not even acknowledge, yet alone respond, to the arguments presented on Petitioner's behalf. Even a litigant convicted of the most heinous of acts is entitled, under principles of due process, to a fair consideration and review of the defense

presented. While Petitioner asked for no more, he was not provided with these most elementary protections guaranteed by the United States Constitution.

Throughout this litigation, Petitioner has conceded that no prejudice exists but has advanced compelling arguments why disqualification under Rule 1.11 is not dependent upon the establishment of prejudice. Petitioner has noted that Rule 1.11 became effective in Pennsylvania on April 1, 1988 and applied to conduct occurring after that date. This litigation was commenced in 1989 and Rule 1.11 therefore is applicable. As of today, there is still no case law in Pennsylvania interpreting Rule 1.11. Nonetheless, before the promulgation of Rule 1.11, the situation of an attorney moving from government service into the private sector was covered by Disciplinary Rule 9-101(B).[2] That *mandatory rule* provided, "A lawyer shall not accept private employment in a matter in which he had *substantial responsibility* while he was a public employee." (Emphasis added.) Given the similarities between DR 9-101(B) and Rule 1.11(a), it follows that precedent interpreting DR 9-101(B) must be used in analyzing the new Rule 1.11. Petitioner's arguments throughout relied on that precedent.

Most importantly, in *City of Philadelphia v. District Council 33*, 503 Pa. 498, 504, 469 A.2d 1051, 1054 (1983), the Pennsylvania Supreme Court, in interpreting DR 9-101(B) explicitly stated:

> Whether or not [the former public attorney] will be able to use the knowledge he acquired

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2. Prior to the effective date of the Rules of Professional Conduct, professional conduct of attorneys was governed by the Code of Professional Responsibility, consisting of (1) canons, which provided axiomatic norms, (2) ethical considerations, which were aspirational in character and (3) disciplinary rules, which were mandatory. *American Dredging Co. v. City of Philadelphia*, 480 Pa. 177, ___, 389 A.2d 568, 570 (1978).

> during the negotiations to the . . . advantage [of his private client] is *immaterial because this Court has never required a showing of potential of actual damage for disqualification.* Our finding that [the former public attorney], as managing director for the City, had substantial responsibility for negotiating the collective bargaining agreement on which this action is based. . . . (Emphasis added.).

Despite this pronouncement, the courts in Pennsylvania continued to insist that prejudice is necessary, thereby effectively ignoring the authority of the Pennsylvania Supreme Court, the ultimate arbiter of the meaning of its own court rules. Petitioner cited numerous other cases which established that disqualification of Zottola and his law firm in the present case was required. *Commonwealth v. Eastern Dawn Mobile Home Park, Inc.*, 486 Pa. 326, 405 A.2d 1232 (1979); *American Dredging; Price v. Admiral Insurance Co.*, 481 F. Supp. 374 (E.D.Pa. 1979); *General Motors v. City of New York*, 501 F.2d 639 (2d Cir. 1974).

As already stated, the Superior Court in its Memorandum Opinion stated, "[Petitioner] has not set forth the manner in which he was harmed by RLM's representation of his grandchildren. [Petitioner] fails to provide this Court with authority, nor are we aware of any, interpreting Rule 1.11 to mean that a showing of potential prejudice or harm is unnecessary." (Slip opinion at p. 5.) This statement simply ignores the arguments made in Petitioner's brief to that Court with its citation and analysis of the cases cited above, all of which showed that disqualification was required on the facts of the present case. The statement could be also read as meaning that no cases had interpreted the new Rule 1.11. If that is what the Superior Court

intended, the statement is at best disingenuous as Petitioner made clear to the court that no case law existed on Rule 1.11 and that cases interpreting the predecessor rule had to be analyzed. Furthermore, the court never once mentioned Petitioner's *concession that no prejudice could be identified,* making it seem that the failure to identify any prejudice was a flaw with Petitioner's argument.[3]

No one can seriously dispute that if the courts of Pennsylvania had simply refused to allow Petitioner to present a defense, due process would have been violated. In this regard, *Atkins v. United States,* 556 F.2d 1028 (Ct.Cl. 1977), is instructive. In *Atkins,* one hundred and forty federal district and circuit judges sued to recover compensation due them. Because the judges of the United States Court of Claims had an indirect interest in the outcome of the lawsuit as a ruling on the merits could effect their pay, a question arose whether those judges should be disqualified from hearing the case. As that Court stated:

> We regret that it falls our lot to decide these cases, and we would much prefer that a resolution of the controversy not be our responsibility. Nevertheless we realize that the plaintiffs are entitled to have their cases heard and decided by a court of the United States, and under the law there is no other court to which they could go. Should we

3. Rule 1.11 is more liberal than its predecessor and provides attorneys with a method of representing a client after substantial prior involvement while a government attorney. Petitioner asserted throughout that Zottola and his law firm failed to comply with the requirements to allow representation. Because all of the courts rejected Petitioner's claim on the basis that no prejudice was shown, none of those court reached the issue of compliance with Rule 1.11's more liberal provisions.

> refuse to hear and decide their cases, the doors to the courts would be closed to them. This could amount to a denial of due process under the 14th amendment to the Constitution. . . . It is a fundamental principle of our jurisprudence that access to the courts to secure and establish important rights should be made available to citizens at all times.

Atkins, 556 A.2d at 1040 (citation omitted).

CONCLUSION

In the present case, the courts of Pennsylvania essentially engaged in a charade. While seeming to allow Petitioner to present a defense to the civil action filed against him, all of the courts involved never even considered Petitioner's argument, let alone responded to that argument. Petitioner asserts that the failure to provide *meaningful review* is essentially the same as failing to allow access to the courts. As the latter is a violation of due process, the former must be similarly viewed. Because Petitioner's due process right have been violated, Petitioner is entitled to relief from this Court.

Respectfully submitted,

JOHN T. BENDER
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Pittsburgh, Pennsylvania 15222
(412) 261-1305

APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITIONER'S PETITION FOR RECONSIDERATION DATED AUGUST 22, 1995

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 126 Western District
Allocatur Docket 1995

Petition for Reconsideration

TAMMY ALLEN, individually, and BREANNE ALLEN and HEATH ALLEN, minors, by their GUARDIAN MERLE KRAMER

Respondents

v.

EUGENE ALLEN AND ELIZABETH ANN ALLEN, his wife

v.

DEBORAH ALLEN,

ADDT'L Respondent

PETITION OF: EUGENE ALLEN

ORDER

Appendix A

PER CURIAM:

AND NOW, this 22nd day of August, 1995, the Petition for Reconsideration is denied.

Mr. Justice Montemuro is sitting by designation.

A True Copy Irma T. Gardner
as of: August 23, 1995
Test: s/ Irma T. Gardner
Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX B — ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITIONER'S PETITION FOR ALLOWANCE OF APPEAL DATED JULY 21, 1995

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

NO. 126 Western District
Allocatur Docket 1995

Petition for Allowance of
Appeal from Superior Court

TAMMY ALLEN, individually, and BREANNE ALLEN and HEATH ALLEN, minors, by their GUARDIAN MERLE KRAMER

Respondents

v.

EUGENE ALLEN AND ELIZABETH ANN ALLEN, his wife

v.

DEBORAH ALLEN,

ADDT'L Respondent

PETITION OF: EUGENE ALLEN

ORDER

Appendix B

PER CURIAM:

AND NOW, this 21st day of July, 1995, the Petition for Allowance of Appeal is denied.

Mr. Justice Montemuro is sitting by designation.

A True Copy Irma T. Gardner
as of: July 21, 1995
Test: s/ Irma T. Gardner
Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX C — ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA DENYING PETITIONER'S APPLICATION FOR REARGUMENT DATED JANUARY 31, 1995

The Superior Court of Pennsylvania
Office of the Prothonotary
1015 Grant Building
Pittsburgh, Pennsylvania 15219

DAVID A. SZEWCZAK, ESQUIRE
PROTHONOTARY

(412) 565-7592

ELEANOR R. VALECKO
DEPUTY PROTHONOTARY

January 31, 1995

John T. Bender, Esquire
114 Smithfield Street
Pittsburgh, PA 15222

IN RE: TAMMY ALLEN ET AL VS EUGENE ALLEN V
DEBORAH ALLEN
NO., 1578 PITTSBURGH 1993

Dear Mr. Bender:

The court has entered the following order on your Application for Reargument filed in the above captioned matter.

"ORDER OF COURT

The court hereby denies the application filed December 9, 1994 requesting reargument or reconsideration of the decision dated November 28, 1994.

Appendix C

PER CURIAM"

DATE: JANUARY 31, 1995

Very truly yours,
s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV/ksw
cc: Dennis St. Mulvihill, Esquire
Cathie J. Fagan, Esquire
Ms. Debbie Allen

APPENDIX D — JUDGMENT AND MEMORANDUM OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA DATED NOVEMBER 28, 1994

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

NO. 1578 PITTSBURGH 1993

TAMMY ALLEN, INDIVIDUALLY AND BREANNE ALLEN AND HEATH ALLEN, MINORS, BY THEIR GUARDIAN MERLE KRAMER

VS.

EUGENE ALLEN AND ELIZABETH ANN ALLEN, HIS WIFE

VS.

DEBORAH ALLEN

APPEAL OF: EUGENE ALLEN,

APPELLANT

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Allegheny County be, and the same is hereby affirmed.

BY THE COURT:

s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

November 28, 1994

Appendix D

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1578 Pittsburgh, 1993

TAMMY ALLEN, INDIVIDUALLY and BREANNE ALLEN and HEATH ALLEN, MINORS, by their GUARDIAN MERLE KRAMER

v.

EUGENE ALLEN and ELIZABETH ANN ALLEN, HIS WIFE

v.

DEBORAH ALLEN

APPEAL OF: EUGENE ALLEN,

Appellant

Appeal from the Judgment entered September 10, 1993, Court of Common Pleas, Allegheny County, civil Division at No. GD 89-13380.

BEFORE: McEWEN, JOHNSON and HOFFMAN, JJ.

MEMORANDUM: DATE: NOVEMBER 28, 1994

Eugene Allen (Allen) appeals from the judgment following the trial court order denying his motion for a new trial following a jury verdict awarding both compensatory and punitive damages to Tammy, Heath and Breanne Allen (the grandchildren). We affirm.

Appendix D

The trial court summarized the facts as follows:

> The [case] before the [c]ourt arose out of the sexual abuse of [the grandchildren] inflicted upon them by [Allen], their [natural] grandfather .... Elizabeth Ann Allen married [Allen] in 1966 and shared several residences with him throughout the relevant time period.
>
> From 1986 through 1988, [Allen] committed various acts against his three grandchildren that formed the basis of claims of battery, intentional infliction of emotional distress and negligent infliction of emotional distress. All of the various acts performed by [Allen] occurred at one of the three residences which he owned with [his wife]. [The grandchildren's] cause[s] of action against [Mrs.] Allen were based on her duty as a property owner to use reasonable care to eliminate the danger [to] her step-grandchildren who were on her property with her permission, or alternatively[,] to protect these grandchildren from her husband, whom she knew or should have known posed a danger to the grandchildren while on her property.
>
> Counsel for [Allen] did not contest the claims of intentional torts, based on [Allen]'s convictions for these acts. The remaining claims against [the Allens] were based on a negligence theory. [During the discovery

> phase of this civil action, Allen filed a motion to disqualify the law firm representing the grandchildren. The motion was denied.]
>
> A jury trial commenced in September of 1992, resulting in a jury verdict finding that [the Allens] had been negligent and that this negligence had proximately caused both personal and bodily injury to the . . . grandchildren. [The court] also directed a verdict against [Allen] on the intentional tort counts. The jury also found that Debbie Allen, the mother of the children, had been negligent and had been causally connected to the injuries sustained by her children. The jury returned a verdict totalling 5.1 [m]illion [d]ollars in compensatory damages and 30.69 [m]illion [d]ollars in punitive damages, against [the Allens] and . . . Debbie Allen.

Trial Court Opinion, dated February 28, 1994, at 2-4. Allen then filed post-verdict motions seeking a new trial. The trial court denied the motions. Judgment was entered, and this appeal followed.

On appeal, Allen argues that the trial court erred when it refused to (1) disqualify the grandchildren's counsel; (2) charge the jury on the "most innocent" rule; (3) instruct the jury that it could consider Allen's criminal conviction and sentence when determining punitive damage; and, (4) grant Allen's request for a remittitur.

The decision to deny a new trial "is within the sound discretion of the trial court, and that court's decision will be overturned on review only if we determine that the court

committed a clear abuse of discretion or error of law." *Chiaverini v. Sewickley Valley Hosp.*, 409 Pa.Super. 630, 633, 598 A.2d 1021, 1022 (1991), *appeal denied*, 530 Pa. 659, 609 A.2d 167 (1992). A new trial will be granted only "where the verdict is so contrary to the evidence as to shock one's sense of justice." *Butler v. Kiwi, S.A.*, 412 Pa.Super. 591, 595, 604 A.2d 270, 272 (1992), *appeal denied*, 531 Pa. 650, 613 A.2d 556 (1992). "Moreover, a new trial should not be granted in a negligence case unless a substantial reason exists." *Solomon v. Baum*, 126 Pa.Cmwlth. 646, 653-54, 560 A.2d 878, 882 (1989), *appeal denied*, 525 Pa. 636, 578 A.2d 930 (1990).

First, Allen contends that the trial court erred in failing to disqualify the law firm of Robb, Leonard and Mulvihill (RLM) from representing the grandchildren pursuant to Rule 1.11 of the Pennsylvania Rules of Professional Conduct. Prior to the commencement of this civil action, Allen was convicted of various crimes based on the sexual abuse of his grandchildren, and sentenced to a term of 55 1/2 to 111 years' imprisonment. Attorney John Zottola was the Assistant District Attorney who represented the Commonwealth in the criminal trial against Allen. After prosecuting the criminal case, Zottola joined the law firm of RLM. Subsequently, the grandchildren retained Dennis St. J. Mulvihill, an attorney at RLM, to represent them in civil action against Allen and his wife. Allen then filed a motion to disqualify Mulvihill and his firm, which was denied. Allen argues the RLM should be disqualified because it failed to obtain the consent of the District Attorney's Office when the firm undertook representation of the grandchildren, in violation of Rule 1.11. Allen also claims that he need not show prejudice resulted from such representation.

Rule 1.11, however, should not apply to the present case. In pertinent part, Rule 1.11 provides:

Appendix D

Rule 1.11 Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter. . . .

Rule 1.11 (a). This rule is expressly limited to a matter in which the lawyer participated personally and substantially. In the present case, Zottola participated personally and substantially only in the criminal prosecution of Allen, which has long since been concluded. Thus, the prohibitions of Rule 1.11 do not apply to this subsequent and entirely different matter, i.e., the civil attempt to secure damages. Accordingly, we do not address the need for consent from the appropriate government agency since the criminal matter in which Zottola participated personally and substantially was different from the civil matter undertaken by Zottola's firm.

Moreover, to apply Rule 1.11 under the present circumstances would not further its purpose. The Comments to the rule make clear that the purpose of Rule 1.11 is to protect against the use of confidential information obtained by the attorney through his or her government service. Here, however, Allen has failed to assert that Zottola obtained any confidential information during the criminal case, and any information regarding Allen's criminal prosecution had become a matter of

public record prior to the institution of the civil case. In addition, Allen has not set forth the manner in which he was harmed by RLM's representation of the grandchildren. Allen fails to provide this Court with authority, nor are we aware of any, interpreting Rule 1.11 to mean that a showing of potential prejudice or harm is unnecessary.

Because we find that Rule 1.11 is inapplicable to the facts of this case, we cannot conclude that the trial court erred in denying Allen's disqualification motion.

Next, Allen asserts that the trial court erred in refusing to charge the jury on the "most innocent" rule as it pertains to punitive damages. "When reviewing a claim that the trial court erred in instructing the jury, the scope of appellate review is whether the court committed a clear abuse of discretion or an error of law which controlled the outcome of the case." *Butler, supra*, at 596, 604 A.2d at 272. In addition, "[a] motion for a new trial based upon the sufficiency of the jury charge will only be granted when the court determines that the charge in its entirety and against the background of the evidence was erroneous and might have prejudiced appellant." *Beechwood Commons Condo. Ass'n v. Beechwood Commons Assocs.*, 397 Pa.Super. 217, 227, 580 A.2d 1, 6 (1990).

The "most innocent" rule was first announced by our supreme court in *McCarthy v. DeArmit*, 99 Pa. 63 (1881). This rule provided that punitive damages were to be assessed according to the acts of the "least culpable" or "most innocent" defendant. *Id.* at 72. Allen claims that because the jury apportioned five percent of the liability to Elizabeth Allen, his wife, she was the "most innocent" of the tortfeasors. Thus, Allen believes "that the highest award of punitive damages that can be

allowed in the case is $230,000, the amount awarded against [Mrs.] Allen." Brief for Appellant at 28.

In *Neal v. Carey Canadian Mines, Ltd.*, 548 F.Supp. 357, 388-89 (E.D.Pa. 1982), the court explained that "[t]he 'most innocent' rule served to protect a joint tortfeasor from the imposition of punitive damages against the defendant based upon the conduct of another defendant against whom the evidence of outrageous conduct had been presented at trial." Here, the trial court charged the jury pursuant to Pennsylvania Suggested Standard Civil Jury Instruction 14.02, relating to claims for punitive damages. In pertinent part, 14.02 provides:

> [Where there is more than one defendant:] You must determine whether punitive damages are to be assessed against each defendant *by that defendant's conduct alone*. . . . While you will return your award of compensatory damages, if any, in one lump sum as to all defendants, you must return a separate verdict as to punitive damages, if any, against each of the defendants. [Emphasis added].

This instruction clearly provides that when punitive damages are sought against separate defendants within the same action, the jury may award separate amounts of punitive damages against each defendant, and, in doing so, must assess the damages on the individual defendant's conduct alone. We agree with the trial court that the instruction, as given, "allowed the jury to properly assess punitive damages if any, against each defendant individually, but in the guise of a joint trial. Thus, the concern of the ['Jmost innocent['] rule [was] met by requiring the jury to

examine the propriety of punitive damages as against each defendant . . . based on their individual conduct." *Id.* at 7-8.

Moreover, if courts were to apply the "most innocent" rule as originally formulated, a plaintiff would be advised to proceed against each defendant individually. Otherwise, the plaintiff's recovery of punitive damages would be limited to the amount attributable to the least culpable defendant. This would frustrate both the policy of judicial economy and the policy underlying punitive damages. First, while a plaintiff may proceed separately against joint tortfeasors, Pennsylvania law encourages the joinder of such tortfeasors in the same action. *See* Pa.R.Civ.P. 2229 (b); *Neal, supra*. We agree with the trial court that "separate trials as to each [d]efendant would have been a waste of judicial resources, would have required the [grandchildren] to twice go through the ordeal of trial, and clearly would not have been in the interest of judicial economy." Trial Court Opinion, Honorable David S. Cercone, dated February 28, 1994, at 7.

In addition, we note that while *McCarthy* has not been expressly overruled, the application of the "most innocent" rule in the present case would frustrate the purpose of the policy underlying punitive damages, which is to "'punish [a defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.'" *Colodonato v. Consolidated Rail Corp.*, 504 Pa. 80, 87, 470 A.2d 475, 479 (1983), quoting Restatement (Second) of Torts § 908 (1) (1979). *See also SHV Coal v. Continental Grain Co.*, 526 Pa. 489, 493, 587 A.2d 702, 704 (1991); *Berry v. Anderson*, 348 Pa.Super. 618, 626, 502 A.2d 717, 721 (1986). Accordingly, we cannot conclude that the trial court erred or abused its discretion in refusing to charge on the "most innocent" rule.

Appendix D

In his third issue, Allen maintains that the trial court erred in refusing to instruct the jury that it could consider Allen's criminal conviction and sentence when determining punitive damages. Seemingly, Allen believes that the jury might have mitigated any punitive damage award if it could have considered his criminal conviction and lengthy prison sentence. While the trial court refused to give this charge, it did permit Allen to introduce evidence to the jury regarding his conviction and sentence. *See* N.T., September 18-21, 1992, at 498, 500. Moreover, Allen has presented no authority, either in the form of a standard jury instruction or otherwise, which suggests that it is an error of law or an abuse of discretion for a trial court to refuse to give an instruction relative to this issue. Accordingly, we are constrained to conclude that the trial court did not err in refusing to give the above instruction.

Finally, Allen claims that the trial court erred when it refused to grant his request for remittitur. In its entirety, Allen's argument consists of the following bald allegation: "A court is permitted to reduce a damage award if it is excessive. Even if Eugene Allen's remaining allegations of error do not entitle him to relief, this verdict is so excessive that a reduction is warranted." Brief for Appellant at 32. Allen cites neither to the record nor to any case law in support of this allegation. As a result, we decline to become substitute counsel for Allen in this matter, and we deem the issue waived. *See* Pa.R.A.P. 2119; *see also Commonwealth v. Badman*, 398 Pa.Super. 315, 322-23 n.2 and n.3, 580 A.2d 1367, 1370 n.2 and n.3 (1990) (issue waived if argument is mere assertion); *Commonwealth v. Long*, 367 Pa.Super. 190, 197-98, 532 A.2d 853, 857 (1987), *appeal denied*, 518 Pa. 617, 541 A.2d 744 (1988) (we will not review issues that are not properly developed by citation to the record and reference to supporting case law).

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Based on the foregoing, we find that the trial court did not commit a clear abuse of discretion or an error of law in denying Allen's motion for a new trial. Accordingly, we affirm that portion of the judgment which set forth the verdict against Eugene Allen.

Judgment Affirmed.

APPENDIX E — OPINION OF THE HONORABLE DAVID S. CERCONE OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY DATED FEBRUARY 28, 1994

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. GD 89-11380

TAMMY ALLEN, Individually, and BREANNE ALLEN and HEATH ALLEN, MINORS, BY THEIR GUARDIAN, MERYL KRAMER,

Plaintiffs,

vs.

EUGENE ALLEN AND ELIZABETH ANN ALLEN, His Wife,

Defendants,

vs.

DEBBIE ALLEN,

Additional Defendant.

OPINION

Filed by:

Honorable David S. Cercone
315 Courthouse
Pittsburgh, PA 15219

Appendix E

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Appendix E

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

No. GD 89-11380

TAMMY ALLEN, Individually, and BREANNE ALLEN and HEATH ALLEN, MINORS, BY THEIR GUARDIAN, MERYL KRAMER,

Plaintiffs,

vs.

EUGENE ALLEN AND ELIZABETH ANN ALLEN, His Wife,

Defendants,

vs.

DEBBIE ALLEN,

Additional Defendant.

OPINION

By: David S. Cercone, J.

Defendants' Eugene Allen and Elizabeth Ann Allen, his wife, have appealed from the Orders of Court denying their individual Motions for Post-Trial Relief following a jury's verdict awarding both compensatory and punitive damages to the Plaintiffs' and against them. Both Defendants have raised numerous issues for consideration on appeal. We will initially address those issues raised by Eugene Allen before turning our attention to those issues raised by Elizabeth Ann Allen.

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The cases before the Court arose out of the sexual abuse of the Plaintiffs inflicted upon them by Eugene Allen, their grandfather. Eugene Allen is the natural grandfather to Tammy, Breanne and Heath Allen. Elizabeth Ann Allen married Eugene in 1966 and shared several residences with him throughout the relevant time period.

From 1986 through 1988, Eugene Allen committed various acts against his three grandchildren that formed the basis of claims of battery, intentional infliction of emotional distress and negligent infliction of emotional distress. All of the various acts performed by Eugene Allen occurred at one of the three residences which he owned with Elizabeth Allen. Plaintiffs' cause of action against Elizabeth Allen were based on her duty as a property owner to use reasonable care to eliminate the danger her step-grandchildren who were on her property with her permission, or alternately to protect these grandchildren from her husband, whom she knew or should have known posed a danger to the grandchildren while on her property.

Counsel for Eugene Allen did not contest the claims of intentional torts, based on Mr. Allen's convictions for these acts. The remaining claims against both Eugene and Elizabeth Allen were based on a negligence theory.

A jury trial commenced in September of 1992, resulting in a jury verdict finding that both Eugene and Elizabeth Allen had been negligent and that this negligence had proximately caused both personal and bodily injury to the Allen grandchildren. We also directed a verdict against Eugene Allen on the intentional tort counts. The jury also found that Debbie Allen, the mother of the children, had been negligent and had been causally connected to the injuries sustained by her children. The jury returned a

verdict totalling 5.1 Million Dollars in compensatory damages and 30.69 Million Dollars in punitive damage, against defendants Eugene and Elizabeth Allen and third party Defendant Debbie Allen.

Eugene Allen initially contends that the Calendar Control Judge erred in denying his Motion to Disqualify the Plaintiffs' law firm, based on the fact that the Assistant District Attorney who prosecuted Allen's criminal trial had become associated with the law firm that represented Plaintiffs at trial. While we did not decide this motion, we believe that Judge McGowan, who was twice presented with this Motion, decided same properly.

Plaintiffs' counsel made proffers to the court concerning their steps at obtaining permission from the District Attorney's office with respect to representing the grandchildren in this lawsuit against Eugene Allen. Counsel for Plaintiffs also received an informal opinion from the Ethics Committee of the Allegheny County Bar Association validating the appropriateness of their representation of the Plaintiffs. Counsel for Plaintiffs also received written confirmation from the District Attorney's Office in February of 1992 concerning the District Attorney's approval of this representation.

We would note that both Defendants were given the opportunity to conduct discovery and to depose John Zottola, the attorney who prosecuted the Allen criminal case and who later became a member of the law firm representing Plaintiffs, concerning any knowledge of facts outside of the trial record that Mr. Zottola might have learned from his involvement in the criminal prosecution of Eugene Allen. Allen failed to do this. While both Eugene and Elizabeth Allen conducted the depositions of numerous witnesses and engaged in other aspects of discovery, neither Defendant deposed Mr. Zottola.

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We believe that the Defendants were given access to all of the pertinent materials that were used in the criminal prosecution of Eugene Allen. Defendants' failure to depose Mr. Zottola with respect to his knowledge of items not available to the Defendants belies their very contentions. Defendants were given their opportunity to attempt to establish prejudice and failed to do so. Defendants cannot now be heard to complain of some unspoken prejudice or hidden evidence known only to the former prosecutor/associate of trial counsel without even the slightest bit of evidentiary support. We find Defendants' conclusionary allegations to be frivolous.

Eugene Allen next contends that we erred by refusing to charge the jury on the "most innocent" rule. We believe that the most innocent rule is outdated and no longer has a proper place in our system of justice. We further believe that the Pennsylvania suggested standard jury instruction 14.02 properly apprises a jury as to the manner in which to assess punitive damages, where more than one Defendant's case has been consolidated for trial. That instruction advises the jury that they are to determine whether punitive damages are to be assessed against a Defendant based on that Defendant's conduct alone and that separate verdicts as to punitive damages, if any, must be found as to each Defendant.

We believe that the joinder of the Defendants' trials was proper pursuant to PaR.Civ.P. 2229(b). Adherence to the most innocent rule would have required separate trials as to each Defendant, would have been a waste of judicial resources, would have required the Plaintiffs' to twice go through the ordeal of trial, and clearly would not have been in the interest of judicial economy. The instruction as given to the jury allowed the jury to properly assess punitive damages, if any, against each Defendant individually, but in the guise of a joint trial. Thus, the concern of

the most innocent rule is met by requiring the jury to examine the propriety of punitive damages as against each Defendant individually, based on their individual conduct.

We believe that the jury was properly able to follow the instructions given to them, based on the award of punitive damages returned by them. The jury returned a verdict of punitive damages against Elizabeth Ann Allen in the amount of Two Hundred Thirty Thousand Dollars ($230,000.00) for each Plaintiff and against Eugene Allen in the amount of Ten Million Dollars ($10,000,000.00) for each Plaintiff. Eugene Allen's attempt at seeking a windfall by hiding behind the skirttails of his wife in an attempt to be punished only as severely as she was can simply not be an appropriate application of the laws and purpose of punitive damages. We believe that Eugene Allen should not and cannot receive such a windfall. Accordingly, we properly refused to instruct the jury concerning the most innocent rule.

Eugene Allen next complains that we erred by refusing to charge the jury that it could consider his criminal convictions and prison sentence when considering whether to award punitive damages. We believe that this argument is without merit.

Allen was permitted to advise the jury that he had been convicted and had received a prison sentence of 55 to 111 years. Allen's counsel was also permitted to argue this very matter to the jury. We do not believe that it would have been appropriate, however, to instruct the jury that a prison sentence could somehow mitigate the award of punitive damages. Accordingly, Allen's requested instructions were properly denied.

Allen next complains that we refused to sever his trial from that of Elizabeth Allen's. Despite the extensive pre-trial

arguments on various evidentiary matters and despite the proffers of testimony to be offered, no such request for a separate trial was made until the fourth day of trial.

The trial court has broad discretion in granting or denying a request for a severance. *Meyer by Meyer v. Heilman*, 503 Pa. 472, 469 A.2d, 1037 (1983). A severance is not properly granted where the issues involve various claims that are interwoven and where prejudice to the parties or the court so exceeds the procedural convenience of a joint trial. *Ptak v. Masontown Men's Softball*, __ Pa.Super. __, 607 A.2d 297 (1992).

We believe that no abuse of discretion occurred by failing to sever the Defendant's trial from his Co-defendant in the middle of trial. We agreed to provide and in fact did provide cautionary instructions to the jury on three separate occasions. We also provided the jury with a specific instruction concerning the use of the questioned evidence. (TT Volume 2 at pages 410-411, 534-535, 657-658; TT Vol.4 P. 368). We believe that Eugene Allen suffered no prejudice from our refusal to grant his motion for severance. The record reflects that trial counsel for Eugene Allen acknowledged the lack of prejudice to his client by a refusal to sever. Accordingly, no abuse of discretion occurred and the Defendant's motion to sever was properly denied.

Defendant next claims that we erred in failing to grant a remittitur. While the verdicts rendered by the jury were certainly substantial, we do not believe that they were excessive as a matter of law.

A new trial may be granted on the grounds that a verdict is excessive and against the weight of the evidence only when the verdict shocks the court's sense of justice and makes a new trial

imperative so that right may be given another opportunity to *Freeman v. Maplepoint*, 393 Pa.Super. 427, 574 A.2d 684 (1990). Likewise, an order of remittitur may only be ordered when a verdict that is supported by the evidence suggests that the jury was guided by partiality, prejudice, mistake or corruption. *Stoughton v. Kinzey*, 299 Pa.Super. 499, 445 A.2d 1240 (1982). "In both situations, granting relief is within the sound discretion of the trial court, and we will reverse only if we find an abuse of discretion." *Krysmalski v. Tarasovich*, __ Pa.Super. __, A.2d (1993).

The Plaintiffs' have unquestionably suffered serious and permanent injuries, both physically and emotionally, as a result of the Defendants' actions, or lack thereof. We believe that the jury, based on the evidence before them, could have properly determined that the Plaintiffs experienced significant pain and suffering, and may continue to do so. We believe that the jury could properly make such an award. See *Botek v. Mine Safety Appliance Corp.*, __ Pa. __, 611 A.2d 1174 (1992).

Similarly, the finder of fact is given broad latitude in determining the amount of punitive damages properly awardable so as to punish the defendant for his or her conduct and so as to deter others from similar conduct. See *Pierce v. Penman*, 357 Pa.Super. 225, 515 A.2d 948, 954 (1986), *appeal denied*, 515 Pa. 608, 529 A.2d 1082.

While the verdicts rendered by the jury were clearly substantial, we do not find these verdicts so excessive as to shock our conscience. Accordingly, we believe that it was appropriate to deny a remittitur and uphold the verdicts as rendered by the jury.

Eugene Allen lastly claims in a supplemental motion that the

Department of Corrections transferred him two days prior to the commencement of the trial, thus preventing him from having access to his documents from the criminal trial. While we fail to see how Defendant was prejudiced by this transfer, as certainly his counsel should have been privy to all information available to his client at this stage of the proceedings, we would also note that counsel never contended that his client's rights had been violated or that his ability to defend Allen had been impaired by this alleged occurrence. If the Department of Corrections violated the Defendant's rights, he may have a remedy in another forum. He surely has not suffered any prejudice with respect to the matter at bar so as to afford him any relief.

Elizabeth Allen has raised eighteen issues, many with multiple sub-parts, concerning why and how she was denied a fair trial in this matter. We are tempted to rely on Judge Aldisert's and the Superior Court's admonition that appeals containing this quantity of issues are presumed to be frivolous:

> I have said in open court that when I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. *U.S. v. Hart*, 693 F.2d 286, 287 n.1 (3d Cir. 1982), quoting Aldisert, The Appellate Bar: Professional competence and professional responsibility — a view from the jaundiced eye of one appellate judge, 11 Cap. U. L. Rev. 445, 458 (1982).

See also Commonwealth v. Akers, __ Pa.Super. __, 572 A.2d 746 (1990). We will nontheless address those issues that have been properly raised and preserved.

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The first issued raised by Elizabeth Allen concerns our ruling denying her motion in limine to exclude testimony or other evidence of Elizabeth's premarital relationship with Eugene Allen and in granting the Plaintiffs' motion to exclude testimony concerning Elizabeth's childhood and personal family history. In support of this line of evidence, Plaintiffs proffered that there would be evidence that Elizabeth Allen was either thirteen or fourteen years old when she began having sexual relationship with Eugene Allen, who would have been in his mid thirty's, married and the father or three children at that time. Plaintiffs also proffered that testimony would be presented that Eugene Allen began taking nude photographs of Elizabeth when she was either thirteen or fourteen years old and that her sexual relationship with Eugene terminated approximately one year after their marriage, when Elizabeth was either eighteen or nineteen years old. Elizabeth told the police who arrested Eugene that she believed that she had become too old for Eugene as of that age.

We carefully reviewed the proffered evidence before determining that its relevant probative value was not outweighed by any potential prejudice from this evidence. (TT Vol.1 p.138).

The decision to exclude relevant but otherwise prejudicial evidence is soundly within the trial court's discretion. *Moore v. City of Philadelphia,* 131 Pa.Commwlth. 586, 571 A.2d 518, 525 (1990), *appeal denied,* 588 A.2d 511 (1990).

Evidence of prior events of similar occurrences or conduct is admissible to show the existence of a dangerous condition or to demonstrate knowledge on the part of the Defendant that a hazard existed. *Vernon v. Stash,* 367 Pa.Super. 36, 532 A.2d 441, 446 (1987).

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In *Lynch v. McStome and Lincoln Plaza Associates,* 378 Pa.Super. 430, 548 A.2d 1276, 1278, (1988), the Superior Court was faced with determining whether evidence concerning another instance involving the same instrumentality that was alleged to have caused the Plaintiff's harm was relevant. The Superior Court held that such evidence could be relevant to prove a number of factors, including a tendency to show that the instrumentality was in fact unsafe or that this instrumentality could cause the type of harm experienced by the Plaintiff or to show that the Defendant had actual or constructive notice of the condition that could cause such harm.

We believe that the evidence of Elizabeth Allen's age when she commenced a sexual relationship with Eugene Allen, his relative age at that time, his actions of taking nude photographs of her at the age of thirteen or fourteen together with his termination of a sexual relationship with her when she reached the age of eighteen or nineteen years, was clearly probative as to whether she would have had knowledge of Eugene Allen's propensity to sexually abuse minors. This evidence was central to the issue as to whether Elizabeth Allen breached her duty to warn the Plaintiffs of the danger presented to them. Elizabeth Allen's prior relationship with Eugene Allen was questionably probative concerning the issue of whether she had actual or constructive notice of the behavior that he was directing towards his grandchildren. We therefore believe that the probative value of this evidence outweighed any prejudice inuring from this evidence. Accordingly, no error was made in permitting the admission of this evidence.

Elizabeth Allen next complains that we erred in denying her motion in limine to exclude evidence of her husband's abuse of children other than the Plaintiffs. Elizabeth Allen raises six sub-

parts to this issue, which include an allegation that we erred in admitting the testimony of Deborah Sauer Bartosh, testimony of John Allen concerning a tape of Eugene abusing other minors, Detective Crowley's testimony concerning the itemization of evidence seized from the Allen home, including the nude photographs of other children, the admissions of newspaper clippings concerning the abuse of other children, permitting Detective Crowley's testimony concerning nude photos of minors found in a hidden compartment in the Allen home as well as proportedly permitting items recovered from the floorboards of the Allen home to be used against her. Once again, in evaluating the admissibility of this evidence, the standard to be reviewed is whether the probative value of this evidence outweighs any prejudicial effect therefrom. When viewed by this standard, it becomes quite evident that no error was committed in admitting this evidence.

Eighteen boxes of evidence were confiscated by the police upon the arrest of Eugene Allen. The Plaintiffs thus had at their disposal eighteen boxes of evidence concerning sexual abuse of minors by Eugene Allen. We carefully considered the evidence that the Plaintiffs wished to use as evidence, and only permitted those items which we believed impacted on whether Elizabeth Allen had knowledge of Eugene Allen's activity. (TT Vol.1 pp. 83-84). This evidence was further only admissible for that limited purpose. Our rationale for allowing this evidence against Elizabeth Allen was stated as follows:

> I am going to allow it at (sic) a limited purpose, but as I said I am going to carefully watch this. It's going to limited — the scope is going to be limited. This evidence must be supported by other evidence that she was aware of it.

(TT Vol.1 p.86).

Within this context, we rejected many pieces of evidence which the Plaintiffs attempted to introduce, including evidence of Eugene Allen's involvement in pornography and evidence consisting of a videotape of Eugene Allen's confession in Minnesota wherein he stated that Elizabeth knew of all his activities. We also excluded evidence from a jailhouse informant named Wasner to whom Eugene Allen allegedly admitted to having perpetrated abuse on minors as well as evidence found underneath floorboards in a room adjacent to Eugene and Elizabeth Allen's bedroom. (See TT Vol.1 pp. 87-96, 107, 113, 135, 152-153; TT Vol.2 p. 456).

We believe that the record adequately presents a careful and limited admission of evidence of Eugene Allen's abuse of children other than Plaintiffs. We believe that the record clearly reflects that this evidence bore significant probative value concerning Elizabeth Ann's knowledge of her husband's sexual activities with minors.

Elizabeth Allen also complains that we permitted the introduction of items recovered from the floorboards and from other hidden compartments within the home. We believe that the record reveals, however, that the evidence which we permitted was for the most part located in the areas that Elizabeth Allen arguably could have accessed. Further, counsel did not object to evidence concerning a diary recovered from the floorboards which was authenticated by Debbie Bartosh, and the testimony of the detective who found that item was limited to the location from which it was recovered. (See TT Vol.2 pp. 455, 456).

Elizabeth Allen also complains concerning the admission of

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newspaper clippings referring to child molestation and/or abductions that were recovered from an unlocked desk in the studio room adjacent to the Eugene and Elizabeth Allen bedroom. We permitted this evidence for the purpose of showing by circumstantial evidence that Elizabeth Allen knew or should have known of her husband's dangerous propensities, yet failed to warn the Plaintiffs of same. Once again, we believe that this type of evidence was properly admitted for the limited purpose for which it was introduced. Elizabeth Allen next complains that it was error to allow the Plaintiff to call Patricia Herzog as a hostile witness and in then refusing to rule that the Plaintiffs were bound by her testimony. This issue is patently frivolous. We initially refused to permit Plaintiffs to treat Ms. Herzog as a hostile witness. After observing the witness' demeanor and listening to her testimony, we reconsidered our ruling and permitted the Plaintiff to treat the witness as a hostile witness. (See TT Vol. 1 pp. 219-233).

We believe that we properly exercised our discretion in permitting Plaintiffs to examine Ms. Herzog as if she was under cross examination, based on her testimony and demeanor prior to our making such a ruling. We believe that it was also appropriate to allow Plaintiffs to impeach Ms. Herzog's testimony, which was on numerous occasions clearly inconsistent with prior statements made by her. Accordingly, Defendant's contention that Plaintiffs should be bound by Herzog's testimony without the benefit of impeaching that testimony is clearly without merit. Accordingly, no error existed in permitting Plaintiffs to call Herzog as on cross and in permitting Plaintiff to impeach her tesimony by confronting her with pior inconsistent statements which she had made.

Elizabeth Allen next contends that we erred by refusing to

strike the testimony of Dr. Ann Burgess. Dr. Burgess was called to testify and offer opinion testimony concerning the injuries and damages sustained by Heath and Breanne Allen. We believe that the record amply supports both the ability of Dr. Burgess to render her opinion as well as a sufficient evidentiary basis to support that opinion.

Elizabeth Allen next contends that we erred by providing the jury with a cautionary instruction that the evidence of abuse of children other than the Plaintiffs was to be considered by them only against Elizabeth to show whether she knew or should have known of Eugene Allen's abuse of the Plaintiffs. Because we believe that this evidence was properly admitted for this precise issue, we can perceive of no error in cautioning the jury as to the limited nature or permissible usage of this evidence.

Elizabeth Allen next contends that we erred in denying her motion in limine to exclude evidence of diaries and Deborah Bartosh's testimony concerning these diaries. Elizabeth claims both surprise and lack of authentication.

The diaries in question were part of the evidence in police custody in the Eugene Allen criminal trial. This evidence was made available to counsel for Elizabeth Allen well before the commencement of the civil trial. These diaries were also part of the evidence listed by Plaintiffs as exhibits in their pre-trial statement. We believe that no unfair surprise existed and that these documents were properly usable in evidence.

We further believe that these diaries were properly authenticated by the testimony of Ms. Bartosh. Accordingly, we believe that these diaries were properly admitted at trial.

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Elizabeth Allen next contends that we erred by permitting videotapes depicting abuse of the Plaintiffs by Eugene Allen. Once again, we believe that the prejudicial impact of these videotapes was not such as to outweigh the probative value of these recordings.

Vieotapes are a form of demonstrative evidence which is admissible where their probative value outweighs the likelihood of improperly influencing the jury's verdict. *Leonard by Meyers v. Nichols Homeshield*, 384 Pa. Super. 1, 557 A.2d 743 (1989), *reargument denied*, 525 Pa. 584, 575 A.2d 1151 (1990). The admission of videotape evidence, just like any other form of evidence, is within the sound discretion of the trial court. See *Jackson v. Spagnola*, 349 Pa. Super. 471, 503 A.2d 944 (1986) *allocatur denied*, 514 Pa. 643, 523 A.2d 1132 (1986).

We believe that the videotapes made by Eugene Allen were admissible in order to aid the jury in determining the nature and extent of damages permissible, including Plaintiffs' claim for punitive damages. We also specifically provided the jury with a cautionary instruction, and made specific reference to the videotape, regarding their obligation to not allow sympathy, prejudice or emotion to guide their deliberations. (See TT Vol.4 at p. 351).

The mere fact that the videotapes were graphic in nature is not of itself sufficient grounds to exclude them. See *Commonwealth v. Marshall*, 523 Pa. 556, 568 A.2d 590 (1989) (photographs of murder victims admissible to prove to the jury whether the victims had been tortured). See also *Engle v. West Penn Power Co.*, 409 Pa. Super. 462, 598 A.2d 290 (1991), __ Pa. __, 605 A.2d 334 (1991) (photographs depicting extensive loss of life and property devastation admissible to help prove force of nature defense).

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We believe that the videotapes were properly admissible here as evidence relating to the issue of damages suffered by the Plaintiffs. Accordingly, their admission was proper. Any prejudice from these videotapes did not outweigh their probative value.

Defendant Elizabeth Allen next contends that is was error for us to admit into evidence various exhibits offered by Plaintiffs. Defendant lists eleven specific exhibits without specifying the error committed in admitting these exhibits. Accordingly, we will not address this issue, as it is not properly specified for our review. We will note, however, that the admission of evidence is generally within the discretion of the trial court. We believe that the record reflects that we properly exercised our discretion in the admission of these exhibits.

Elizabeth Allen next claims we erred by refusing to permit the testimony of William Bichsell. Elizabeth Allen sought to present this testimony to show that Mr. Bichsell had signed a consent form to allow Eugene Allen to test his child on one of Allen's machines. We simply cannot perceive any relevance to Bichsell's testimony.

Elizabeth Allen apparently contends that because Mr. Bichsell believed the representations of Eugene Allen, it was thus reasonable or excusable for her, the wife of Eugene Allen, to have been unaware of Mr. Allen's propensity to abuse minor children. We do not believe that this testimony would have been relevant to the jury's consideration as to whether or not the longtime wife of Eugene Allen was aware of his dangerous propensities, and thus had a duty to warn the Plaintiffs of the danger inherit within her home. We therefore properly excluded this evidence. (See TT Vol.4 pp.71-74).

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Elizabeth Allen's next two issues contend that we erred in denying her request for a non-suit and that we erred in directing a verdict on her behalf. We believe that the evidence was such that the jury could properly conclude Elizabeth Allen was negligent and that she violated her duty of care to her step-grandchildren. Accordingly, no error was committed by denying Elizabeth Allen's motion for a non-suit and for a directed verdict.

Elizabeth Allen next complains that we erred in granting various Plaintiffs' instructions and in denying various of her instructions and in charging the jury that a premises owner has a duty to use reasonable care to eliminate dangers to minors on the premises with the owner's permission and to protect these minors from any person the owner knows or should have known posed a danger to these minors. We believe that the charge as a whole properly advised the jury of the relevant law they were to apply to issues before them.

Among the various instructions given to the jury, we instructed the jury as follows:

> An owner of the premises, the property, has a duty to use reasonable care, reasonable care to eliminate any danger to minors who are on the premises with permission, or to protect said minors from any person the owner knows or should know poses a danger to the minors on the premises.(TT Vol.4 at p. 367)

The Restatement (Second) of Torts §343B sets forth the duties owed to child licensees and invitees. This section indicates that where the possessor of land would be subject to liability to a child for physical harm caused by a condition on the land if the

child were a trespasser, the possessor is subject to liability if the child was a licensee or an invitee.

We believe that a child is entitled to at least as much protection as would be owed to a trespasser. We also believe that the distinction between invitees and licensees recognized at common law has become less recognized and less defined as society has advanced and become more complex.

We believe that the instructions given to the jury provided the jury with the appropriate law to decide whether Elizabeth Allen was negligent for failing to warn the minor Plaintiffs of the potential danger to them posed by the activities of her husband and for her failure to protect her step-grandchildren from their grandfather. Elizabeth Allen cannot properly avoid responsibility for the harm inflicted upon these minors simply by closing her eyes to her husband's actions. Elizabeth Allen allowed her husband to invite his grandchildren upon property that she owned with her husband. The evidence was such that the jury could have properly believed that Elizabeth Allen was aware or should have been aware of her husband's activities. Elizabeth Allen's failure to take any steps to protect these children or to warn these children was properly a ground upon which she could be found liable. The jury could properly have found that Elizabeth Allen's slaim of ignorance was not credible. Deliberate ignorance should not shield a property owner such as Elizabeth Allen from what she in reality knows or should know is occurring on her property. This is especially so where the injured parties are children.

We would note that other courts have also recognized the duty of a home owner to protect others on their property from the activities of dangerous individuals sharing their property. See *Jobe v. Smith,* 159 Ariz. 36, 764 P.2d 771 (1988); *Pamela L. v.*

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Farmer, 112 Cal. App. 3d 206, 169 Cal. Rptr. 282 (1980); *Anaya v. Turk,* 191 Cal. Rptr. 187, 159 Cal. App. 3d 1098 (1984); *Antoniewicz v. Reszcynski,* 70 Wis. 2d 836, 236 N.E. 2d 1 (1975).

We believe that one of the public policies of this Commonwealth is to safeguard its children. As our Pennsylvania Supreme Court has noted, ". . . the law in general seeks to protect minors . . . and . . . we accept that legislative judgment as defining a duty of care on the part of adults vis-a-vis their minor guests." *Orner v. Mallick,* 515 Pa. 132, 527 A.2d 521, 523 (1988).

Our legislature has enacted statutory requirements mandating various professionals to report child abuse that is discovered by them. This legislative scheme also permits others to report child abuse where they have reasonable cause to suspect this is occurring. Any such good faith reports immunize the reporter from any civil or criminal liability.

The Restatement (Second) of Torts also places a duty to aid or protect individuals who come within one's custody. We have no difficulty in concluding that Elizabeth Allen, the step-grandmother of the minor Plaintiffs, had a duty to protect these children in her own home from her husband's actions, where she either knew or should have known of his actions.

We believe that the remainder of the instructions contested by Elizabeth Ann Allen were properly given to the jury. We properly instructed the jury on Debbie Allen's duty of care to her children, the minor Plaintiffs. (See TT Vol.4 at pp. 365-367)

Similarly, we believe that the evidence was sufficient so as to instruct the jury concerning compensatory damages for Breanne and Heath Allen. (See TT Vol.4 pp. 368-369). We likewise

believe that it was appropriate to instruct the jury concerning the future medical expenses that the Plaintiffs could require.

Elizabeth Allen next contends that it was error to deny her request that we find as a matter of law that punitive damages could not be assessed against her. We believe, however, that this was a jury question, and that the jury could properly have found that her conduct was outrageous in failing to warn and/or protect these children from her husband.

Elizabeth Allen next contends in boilerplate fashion that the verdict was against the law, against the evidence or against the charge of the court. As this allegation is not properly set forth we will not address these contentions.

Elizabeth Allen next contends that the amount of the verdict, the punitive damage award, and our failure to mold the verdict either with respect to the jury's apportionment or with respect to punitive damages was error. As was previously stated with respect to this issue as raised by Eugene Allen, we do not find the jury's verdict to be shocking to our conscience. The verdict is certainly substantial, but we believe that the jury could appropriately make such an award based on facts before it.

Elizabeth Allen next claims that our denial of her request for remittitur was error. Once again, this has previously been addressed wih respect to Eugene Allen and we hereby adopt our rationale as set forth in that section of this opinion.

Elizabeth Allen further contends that we erred in denying her Motion for Post-Trial Relief in the nature of a Motion for New Trial and/or Motion Notwithstanding the Verdict and or Remittitur. These allegations are once again raised in a boilerplate fashion, and will not be addressed.

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Lastly, Elizabeth Allen contends that we erred by granting Plaintiffs' Motion to Add Delay Damages. We believe that delay damages were properly awardable here, were properly calculated and were properly added to the jury's verdict.

For the within reasons the Defendants' Motions for Post-Trial Relief were properly denied.

BY THE COURT
s/ DS Cercone J.

DATE: February 28, 1994

APPENDIX F — OPINION OF THE HONORABLE BERNARD J. McGOWAN OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD89-13380

TAMMY ALLEN, individually, BREANNE & HEATH ALLEN, by they guardian ad litem, MERLE S. KRAMER,

Plaintiffs

vs.

EUGENE ALLEN, ELIZABETH ANN ALLEN,

Defendants

OPINION

MCGOWAN, J.

COUNSEL OF RECORD:

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The prosecutor in this criminal action was John Zottola, Esquire, Assistant District Attorney in the office of the District Attorney of Allegheny County and presently Judge Elect John Zottola of this Court.

After prosecuting the said criminal action, Mr. Zottola left his employment as an Assistant District Attorney and joined the law firm of Robb, Leonard & Mulvihill as an associate. Subsequently the instant civil action against the Allens was filed by Attorney Mulvihill.

The Defendants, Eugene Allen and Elizabeth Ann Allen, filed a motion before me prior to the trial, which was held

before the Honorable David S. Cercone, to disqualify Attorney Mulvihill and his law firm because of the association of Mr. Zottola at all times pertinent to this civil litigation from the filing of the lawsuit and through the various pretrial stages up to the point of the filing of the motion with the Mulvihill firm.

The predicate for the motion was a perceived violation of Rule 1.11 of the Pennsylvania Rules of Professional Conduct which states as follows:

> "Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee unless the appropriate government agency consents after consultation."

The motion pointed out that Mr. Zottola had successfully prosecuted on behalf of the Commonwealth the criminal case against Eugene Allen, the Defendant, in this civil action.

The motion which was presented on April 27, 1992 was denied by this Court because there was not shown any sufficient nexus between Mr. Zottola's role as prosecutor of the Defendant Eugene Allen and any conceivable harm or disadvantage to any of the Defendants in this civil action.

Mrs. Allen postulated in her motion that Mr. Zottola had a chance to review the presentence report on her husband which was composed in the ordinary course after the guilty verdict and prior to sentencing on the verdict. Mrs. Allen complains

that she was not given a chance to review and copy the presentence report having applied for such permission to the Honorable Jeffrey A. Manning, the Trial Judge in the criminal action against Mr. Allen. This statement is only partially correct. On April 9, 1992, an Order was entered permitting Eugene Allen to have a copy of his presentence report without any restriction on its dissemination. Moreover, the Court entered an Order permitting the deposition of Attorney John Zottola to be taken by the Defendants to allow discovery on any matter which would have included the right to inquire into all knowledge Mr. Zottola had whether it was known to the Defendants or not without any restriction on his knowledge of the contents of the presentence report. The Defendants declined to depose Attorney Zottola and now want to say they were prejudiced in the Attorney Zottola gained knowledge of the subject matter of the civil case which was unavailable to them.

Ms. Elizabeth A. Allen was not delivered a copy of the presentence report as was her husband Defendant, Eugene Allen.

However, in view of the foregoing Order permitting the deposition of Mr. Zottola and further in view of the fact that Mrs. Allen was aware that her co-Defendant and husband, Mr. Allen, had in his possession the presentence report without any restriction as to its further divulgence, Mrs. Allen had only to notice the deposition of her co-Defendant husband or move for the production of the document, to get full discovery concerning the presentence report.

Mrs. Allen has no basis for her factually incorrect statement that she was prejudiced because she was not given a

chance to review and copy the presentence report. She had the opportunity to subpoena the document from her co-Defendant at trial and/or the right and ability to file a request for production of the same. She also had the unfettered right to depose Mr. Zottola concerning the presentence report and any other matter peculiarly within his knowledge. Any failure to review the presentence report by Mrs. Allen is solely a result of her not using the discovery procedures or subpoena power available to her.

Further, Defendant Eugene Allen, who had full knowledge of the presentence report, in arguing the matter before this Court both pretrial and post trial, and being a co-movant with his wife, has yet to state what was unknown to his wife in the report that prejudiced her defense of the action.

Being aware of Attorney Zottola's association with the Mulvihill firm, District Attorney Robert E. Colville consented to the participation of Attorney Mulvihill in the prosecution of the civil case against the Defendants. Hence, the requirement of Pa. R.C.P. 1.11 was satisfied. Further, there is no argument that Attorney Zottola was not screened from participation in the matter or that he would share in the fee.

Mr. Zottola, according to Mrs. Allen in her Motion to Disqualify, procured the consent of District Attorney Colville by stating in a letter to Mr. Colville that the information available to him at the time of the criminal prosecution was the same as the information that was disclosed to Defendant's counsel in the form of discovery (discovery under the Pennsylvania Rules of Criminal Procedure) and ultimately the same information which became public record when it was presented in the form of testimony or exhibits in the criminal trial.

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The Petition of Mrs. Allen went on to state that the above quoted statement to the District Attorney from Mr. Zottola was in error because indeed he had reviewed the presentence report which was not part of the public record.

It strains credulity to make a statement that the District Attorney of Allegheny County would not be aware of the fact that a successful prosecutor of a criminal Defendant would be aware of and have reviewed the presentence investigation of the convicted Defendant. Mr. Colville knew or knows that the prosecution routinely reviews presentence reports.

Considering the District Attorney's clear knowledge of his prosecuting assistants reading the presentence report prior to sentencing, it is absurd to argue that Zottola's not mentioning the presentence review of the presentence report in his letter to District Attorney Colville was untruthful or prejudicial to the defense or served as a false predicate for Mr. Colville's consent. It would have been a dereliction of duty for Mr. Zottola *not* to read the presentence report. The District Attorney, in passing on Mr. Zottola's request to be released under P.R.C. 1.11 was well aware of the fact that Mr. Zottola had read the presentence report. The Defendant's contention in this regard is utterly frivolous.

This Court is confronted post trial with what it was confronted with in April of 1992 and that was an attempt to invoke Rule 1.11 when the rule obviously did not apply because of the consent of the District Attorney and because Defendants were able to show no prejudice to them in their civil proceedings by Attorney Mulvihill's participation at a time when Attorney Zottola was an associate of his law firm.

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For this reason, the Motion for Disqualification of counsel was denied on April 27, 1992 and an appropriate Order was entered post trial denying the same.